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Why Do We Fear Civil Law in Labour Law?

Introduction

Discussion concerning the nature of labour law and its position in the legal system has been an ongoing debate since the emergence of contemporary labour law and it lacks a specific resolution to date. The resolution of the relationship between labour law and civil law has always led primarily to the opinion that labour law is a separate branch of law and it would be better to keep the relative importance of civil law at a minimum in applying labour law provisions, whereas at best, the application of civil law in labour law should be fully precluded. It is apparent, above all, in the approaches of labour law activists that they fear that civil law may be implemented in labour law. This rationale has always been founded on the idea of protecting the employee as the weaker party in an employment relationship. Upon reforming Estonian labour law, the discussion has also focused on the labour law activists' claim that labour law must be a separate branch of law, whereas the application of civil law principles is pointless and contrary to the people's legal awareness. The fear of abuse on the part of the employer is so deeply rooted in people that any attempts to introduce more freedom of contract in employment relations lead to fierce resistance while the attempts are not regarded as a serious topic in further discussions.*[1]

1. Labour law and civil law

1.1. Development of private law and labour law

The development of labour law cannot be viewed separately from the general development of private (civil) law. Without comprehending how civil law develops, we are unable to get a clear idea of how labour law develops and what the main distinction between labour law and general civil law is.

Industrial production, the development of which commenced at the end of the 18th century, at the beginning of the 19th century inevitably brought about changes in the contemporary employment relations. Although the first codes of private law appeared at the beginning of the 19th century, they do not reflect the transformed conditions in public life as a whole. It is understandable as the preparation of the codes lasted over a relatively long period of time and therefore the rapid changes in society could not be taken into account in laws. As a result, the contemporary employment relations

[1] P. Hanau. Arbeitsrecht in der sozialen Marktwirtschaft. – Festschrift zum 125jährigen Bestehen der Juristischen Geselleschaft zu Berlin. D. Wilke (Hrsg.). Berlin, New York: Walter de Gruyter, 1984, S. 228.

are not reflected in civil codes. This, however, does not mean that the development of employment relations was not reflected in the civil codes at all. Thus, various civil law codes reflect contracts concerning provision of services.*[2] Although the above-mentioned provisions remained too scarce to regulate the relations between workers and manufacturers, they still serve as a basis for the development of contractual employment relations. The formation of public law rules that has been emphasised in relation with labour law and its developmental peculiarities has determined the development of labour law outside civil codes. However, here we must make a distinction between industrial work and work that was not done in factories. The enforcement of protection rules was primarily related to industrial work and it was, first and foremost, aimed at preventing the exploitation of minors and women. It established borders for the application of freedom of contract to industrial work. The works performed in households were not included in this regulation and the enforcement of protection rules was neither necessary nor important in this area. Thus, stressing the enforcement of public law rules as a particular feature of the development of the employment relationship, only one aspect of the development of employment relations is stressed. The development of employment relations in Estonia is no exception. The Baltic Private Law Code contained general rules concerning how and under what principles the employment relationship should be regulated. In addition thereto, the Russian Industrial Work Act, governing the legal position of factory workers upon performing their work, was also in effect on the territory of Estonia.*[3] Yet before the Industrial Work Act was passed, individual legal instruments were adopted that regulated primarily the work of minors and women in factories.*[4] However, the enforcement of these protection provisions does not lead to the establishment of labour law as a separate branch of law beside general civil law. Many years will pass until we can speak of labour law as a uniform branch of law. In 1920–1930s, labour law develops into an independent branch of law; it is primarily due to the fact that the public law protection rules play an increasingly important role and the private law rules remain in the background. An extreme example is Soviet Russia where all the provisions governing dependent employment relationships are assembled into a common labour code. The labour code serves as an example where the state actually regulated all necessary working conditions, and in such a system labour law had nothing in common with private law.

In the case of Soviet labour law, the questions of whether labour law in fact existed in such a system was justified. Proceeding from the regulatory level, a separate branch of law — labour law — had been created and the regulatory expression of that branch of law was the labour code. Examining the content of the issue, labour law did not exist in such a system — the parties lacked an opportunity to freely negotiate the more important working conditions, freedom of collective agreement did not apply, the parties could not organise strikes and lock-outs to ensure that their demands be satisfied. Consequently, the elements of labour law characteristic of social market economy were not there. This testifies that Soviet labour law attempted to restrict the likelihood of people adopting decisions and agreeing on issues independently. The total control exercised by the state over the working conditions and the behaviour of the parties to employment relationships were integral parts of the system.

Although in the 1920–30s, the opinion that labour law is public law becomes increasingly prevalent, its connections with private law are still pointed out. Thus, according to the comments on the Workers' Employment Contract Act of Estonia, the workers' employment contract is a civil law contract, the position of which is regulated by a separate act.*[5] In theory, however, labour law was viewed as public law.*[6]

The development of the Estonian labour law system is inevitably related to the development of Russian labour law. From the establishment of Soviet power until the restoration of Estonia's independence, the development of Estonian labour law was a part of the development of the labour law legislation of the Soviet Union. Thus, the division of law into private and public law was not recognised and the implementation of civil law principles was out of question. In the Soviet legal theory, the borderline between labour law and civil law was drawn according to the goals of the particular branch of law. The goal of civil law was to regulate work results in the form of, *e.g.* contract for services, whereas the main function of labour law was to regulate the work process or working

2 See *e.g.* the facsimile publication of Tsiviilseadustiku 1940. a. eelnõu (Civil Code. Draft 1940). Tartu, 1992, sections 1929–1945 (in Estonian).

3 G. Tavits. The Position of Labour Law in the Private Law System. – Juridica International. Law Review. University of Tartu, V, 2000, pp. 126–127.

4 E. Khokhlova (Sost.). Kurs rossiskogo trudovogo prava v 3-kh tomakh. Sankt-Peterburg, 1996, st. 34.

5 J. Põllupüü, A. Kallas. Tööliste töölepingu seadus määruste, seletuste ja lisadega (Workers' Employment Contract Act with Regulations, Explanations and Annexes). Tallinn: Rahva Ülikooli Kirjastus, 1937, § 3, komm. 4 jj. (in Estonian).

6 A.-T. Kliimann. Õiguskord (Legal Order). Tartu: Akadeemilise Kooperatiivi Kirjastus, 1939, lk. 143 (in Estonian).

conditions, how work had to be carried out.*[7] The analyses of the period did not discuss the question of whether labour law was civil law or not. Labour law was regarded as a separate branch of law. At the same time, it was admitted that civil disputes were disputes arising from labour, family and civil law relationships.*[8]

During the first years after the restoration of Estonia's independence the prevailing opinion was that labour law served as an independent branch of law and it was an area of law that, being a part of private law, still contained many legal provisions of public law nature. Until 1997, it was not actually discussed that the provisions contained in contract law could be applied in labour law.

The distinctive features of labour law have been primarily emphasised in relation to the fact that labour law provisions serve as protecting the employee, and as the provisions protecting the employee are unilaterally binding, it is impossible to use the civil law principles when regulating employment relations. Such an approach, however, is not correct as the civil law principles need to be taken into account when regulating both individual and collective employment relations.

1.2. Functions of labour law

Working methods are different and this may be due to the fact that the legal regulation of employment relations may also differ. Work is always a person's purposeful intentional activity that is, above all, aimed at creating values. Work may be performed in a subordination relationship with the person providing work, whereas work may also be performed in equal relations with the person providing work. Depending on the nature of the relations between the employee and the person providing work, the legal regulation must also differ.

As a rule, labour law in its historical development serves as a cornerstone and mirror of the existing political government system. The various periods of labour law are determined each time by the existing government forms and government ideologies.*[9] According to the applicable constitutional principles and forms of organising the state — *e.g.* tsarist state, National Socialism, Estonian SSR, Republic of Estonia, *etc*. — different ways of organising employment relations may be distinguished.

Labour law is an essential element of the industrial society. In the developed industrial society, labour law performs several equivalent functions: it protects socially weaker and economically subordinated employees with regard to minimum standards; through collective autonomy, it creates prerequisites for the fair levelling and harmonisation of the conflicting and common collective interests of the parties in the labour market; in the interests of the competitiveness of the national economy it promotes effective production of goods and services, which involves minimum conflict; in addition to that, labour law ensures the stability of the state and society through resolving the particular interests and conflicts of the parties in the labour market.*[10]

For the employee, the employment contract is the most important transaction during his or her life; the employee renders to the employer his or her working abilities and capacity; of the remuneration the employee must ensure support to himself or herself and his or her family. Therefore, it must be guaranteed that the employee is remunerated according to the work performed, that hazards are not posed to his or her health when working, that he or she maintains his or her job. Theoretically, it would be possible to guarantee all this by particular agreements within the employment contract.*[11] Freedom of contract is applicable only when both parties are equal and equally strong. Unfortunately, in the case of the employment contract it is not so as the employee is traditionally the weaker party to an employment contract and consequently he or she cannot affect the employment contract in the manner as the employer. Labour law attempts to mitigate inequality in various ways: by restricting freedom of contract, by recognising collective agreements and by involving employees in decision-

7 A. Pasherstnik. Teoriticheskiye voprosy kodifikatsi obshesojuznogo zakonodatelstva o trude. Moskva: Izdatelstvo Akademi Nauk SSSR, 1955, st. 22; L. Gintsburg. Sotsialisticheskoye trudovoye pravootnosheniye. Moskva: Nauka, 1977, st. 46.

8 Eesti NSV tsiviilprotsessikoodeks. Ametlik tekst koos muudatuste ja täiendustega seisuga 1. mai 1990 (Code of Civil Procedure of ESSR. Official text with amendments and supplements as of 1 May 1990). Tallinn: Olion, 1990, § 1 lg. 2 (in Estonian). The same principles are established by the applicable Code of Civil Procedure, see tsiviilkohtumenetluse seadustik (Code of Civil Procedure) (adopted on 22.04.1998; entered into force 01.09.1998) section 1 (2). – Riigi Teataja (The State Gazette) I 1998, 43–45, 666; last amended: Riigi Teataja (The State Gazette) 2000, 55, 365 (in Estonian).

9 H. Brox, B. Rüthers. Arbeitsrecht. 14. Aufl. Stuttgart: Kohlhammer, 1999, S. 3.

10 *Ibid*., p. 5.

11 *Ibid*., p. 6.

making procedures.*[12] Although the employee and employer are equal from the legal point of view, social imbalance will lead to inequality between the employee and employer.

An employment relationship is a form of shaping private autonomy. A contract between the employer and employee serves as a legal basis for performing the promised work. The dependency of the employee is nothing but the outcome of the transactional formation of a legal relationship. Employment contract law constitutes the main part of labour law. The employment contract contains, above all, the basis for performing work in an employment relationship, be the content thereof determined by law, a collective agreement or an individual agreement. The sphere of validity of labour law is not determined by an individual and his or her legal position but by contract law.*[13]

Upon legal regulation of employment relationships, the already existing patterns cannot be discarded. It is not so much about whether an employment contract is regulated by a separate law or within the framework of contract law. Rather, it is important that the regulation be comprehensible. If people are used to having an unambiguous regulation system for all issues, it is the task of the legislator to ensure that it is so. At the same time, the regulation may not hinder the normal development of relations between individuals. When ensuring legal regulation, one must avoid two extremes — regulation may not be too detailed on the one hand, and regulation may not be too general on the other hand. The level of detail in regulating employment relationships is primarily dependent on two criteria:

(1) economic conditions;

(2) strength of the employee and employer organisations and their ability to regulate employment relationships.

2. Employment contract as civil law contract

An employment contract serves as the basis for the creation of a labour law relationship. The voluntary nature of performing the work and the existence of an employment contract in private law are important features in identifying a labour law relationship. Consequently, it is important to bring freedom of contract into focus in employment relationships. The voluntary nature of the work performed is manifested in the employment contract. We can speak about an employment contract as a bilateral transaction. The intention of an individual, manifested in his or her expression of will, plays an important part in the transaction. The expression of will must conform to the actual, freely developed will of the individual. The above-mentioned principles that are used in civil law will be applied also in labour law.

An employment contract is a private law contract. We interpret the private law contract as a situation in which the general provisions of contract law are applicable to the contract. Thus, an employment contract can be regarded as a civil law contract. However, an employment contract has not been always regarded as a civil law contract. Although different views exist about the legal nature of a relationship established under an employment contract, the view that an employment contract is a relationship under the law of obligations is predominant.*[14]

The reason why an employment contract may be regarded as a civil law contract arises from the fact that the provisions governing employment contracts are found in civil codes.*[15] Although over time they have been supplemented with various individual acts, falling within the sphere of public law, employment contracts have established themselves in civil codes. The obligational nature of a labour law relationship is indicated by the fact that employment contracts are governed by the law of obligations.*[16] However, this cannot be the only criterion.*[17] Here we cannot disregard the aspects of the historical development of legal regulation. The origins of the employment contract as a civil law

12 *Ibid*.

13 *Ibid*., p. 48.

14 B. Boemke. Neue Selbständigkeit und Arbeitsverhältnis: Grundsatzfragen sinnvoller Abgrenzung von Arbeitnehmern, Arbeitnehmerähnlichen und Selbständigen. – Zeitschrift für Arbeistrecht, 1998, No. 3, S. 320; W. Zöllner, K. Loritz. Arbeitsrecht: ein Studienbuch. 5. Aufl. München: Beck, 1998, S. 151–155.

15 See *e.g.* § 611 *ff*. O. Palandt. Bürgerliches Gesetzbuch. Bearbeitet von Bassenge, P. u.a. 60. Aufl. München: Beck, 2001.

16 H. Hammen. Die Gattungshandlungsschulden: Inhalt der Schuld, Haftung und Haftungbeschränkungen bei fehlerhafter Leistung, dargestellt am Beispiel der Arbeitspflicht eines Arbeitnehmers und der Pflichten eines Vermögenverwalters. Frankfurt am Main: Vittorio Klostermann, 1995, S. 168.

17 W. Gast. Das Arbeitsrecht als Vertragsrecht. Heidelberg: Rv Decker; C. F. Müller, 1984, S. 52 *ff*.

contract go as far back as to Roman private law.*[18] In Roman private law, various consensual contracts — *locatio conductio* — were used. According to the purpose of the contracts, they were divided into *locatio conductio rei*, *locatio conductio operis* and *locatio conductio operarum*. Of these contracts, *locatio conductio operarum* served as a predecessor of the contract of service (contract of employment). In ancient Rome, working for remuneration (*operae illiberales*) was considered inappropriate for a free man. Special remuneration, so-called *honorarium* was paid for the work performed by free men (*e.g.* teaching of fine arts, lawyer's and physician's services). The relationship of a physician and lawyer with his or her clients was referred to as *mandatum*.*[19] With regard thereto, work was divided into two — physical labour and intellectual work. In the German Civil Code and the Estonian Civil Code*[20] the distinction was no longer made.*[21] The origins of employment contracts in Roman private law have given ground to the claim that labour law as a whole dates back to Roman private law, not to the 19th century when the development of factory legislation commenced.*[22] Nevertheless, it is evident that the modern labour law as we know it in the present day has its start, first and foremost, in the evolvement of factory legislation during the industrial revolution period. With regard to both legal theoretical and practical treatment, it is correct to relate the employment contract as a private law contract to Roman private law and associate it with civil law contracts. Thus, from the historical perspective, the employment contract is related to civil law and civil law contracts.

3. Employment relationship as lasting obligational relationship

A private law relationship is either proprietary or related to an individual and his or her legal position. The relationships related to an individual and his or her legal position are relationships involving the provision of welfare to an individual, and these rights and duties have been regulated in detail by family law.

As a labour law relationship does not fall within this regulation complex, it may be regarded as a proprietary relationship. A proprietary relationship is a relationship in the law of obligations or in the law of property. A legal relationship in the law of property is related to the legal object serving as a thing whereas its existence is immediately dependent on the legal object. A relationship in the law of obligations is not related to the legal object serving as a thing and thus the existence of a relationship in the law of obligations is not related to the above-mentioned legal object. Consequently, a labour law relationship can only be a relationship in the law of obligations. A labour law relationship as a relationship in the law of obligations is immediately also a private law relationship.*[23]

A labour law relationship has been characterised as a lasting relationship in the law of obligations. A lasting obligational relationship, in its turn, can be characterised so that the performance due is in the form of lasting activities or a repetitive individual activity performed over a longer period.

It appears from the feature "repetitive" that an obligational relationship which is not lasting is, in its existence, dependent on the content of the duty to perform agreed upon and expires after the duties have been performed (actual performance). A lasting obligational relationship, however, is not dependent on the rights and obligations arising therefrom by its nature. It does not expire automatically. A labour law relationship as a lasting obligational relationship does not expire with the completion of the duties to perform work and pay remuneration, arising from the labour law relationship. A lasting obligational relationship requires a particular basis for termination.*[24]

It follows from the provisions concerning the termination of an employment contract that a labour law relationship is a lasting obligational relationship. With regard to these provisions it is expected that a labour law relationship does not expire with its actual performance but a specific basis is necessary for terminating a labour law relationship each time. These bases and their impact on the

18 H. Honsell. Römisches Recht. 2. Aufl. Berlin, Heidelberg, New York: Springer, 1992, S. 128 *ff*.

19 R. Richardi. Der Arbeitsvertrag im Zivilrechtssystem. – Zeitschrift für Arbeitsrecht, 1988, No. 3, S. 223.

20 See *e.g.* Civil Code (Note 2), sections 1929–1945.

21 *E.g.* according to *BGB* subsection 611 (2), any type of service may be the object of the contract of service, see O. Palandt (Note 15), 2001.

22 R. Trinkner, M. Wolfer. Modernes Arbeitsrecht und seine Beziehungen zum Zivilrecht und seiner Geschichte. – Betriebs-Berater, 1986, No. 1, S. 4–9.

23 H. Hammen (Note 16), p. 171.

24 *Ibid*., pp. 172–173.

termination of a labour law relationship are regulated in detail in individual acts. As a rule, employment contracts are concluded for an unspecified term and therefore the termination of an employment contract is not related to the arrival of the deadline but the employment contract can be terminated on the bases prescribed by law. Although employment contracts are generally concluded for an unspecified term, they can be entered into for a specified term, *i.e.* until the completion of a particular construction project. In such cases, the employment contract concluded may be regarded as an employment contract concluded for a specified term and consequently it terminates due to the expiry of the term. The way of determining the term will remain for the parties to the employment contract to decide; however, it does not change the nature of the employment contract. It is still an employment contract concluded for a specified term. For example, an employment contract concluded for a term expiring with the completion of a particular construction precludes that the contract is based on teamwork in the course of which every worker is expected to contribute to the completion of the construction. Thus, the employment contract may, on the one hand, expire for a particular worker before the actual completion of the construction. On the other hand, in such a case it need not be an employment contract concluded for a specified term. An employee may be employed by a contract concluded for an unspecified term while their task is to perform particular works during the construction. The employer will decide on the assignment of the employee to a particular construction project under his or her authority according to the conditions of the employment contract.

In the case of relationships in the law of obligations the temporal feature is particularly important. As every lasting relationship in the law of obligations requires a particular fact of completion, the notion gives rise to a need for a specific period between the creation and termination of such a relationship. Relationships in the law of obligations that are not lasting by nature may last for some time but need not necessarily be of a lasting nature.*[25] Relationships in the law of obligations that are not lasting by nature expire when the obligations serving as their content have been discharged, *i.e.* a contract between a dentist and patient to fill teeth will expire after the task has been completed. Such contractual relationship is not a lasting obligational relationship although the dentist may need a whole day to complete the work agreed upon. Such a relationship does not require a special completion element. All employment relationships that do not expire due to a special element are not lasting obligational relationships. Thus, they cannot be treated as labour law relationships since duration is the constituent feature of labour law relationships.*[26]

An employment contract as a civil law contract obliges both parties to perform financially appraisable acts. An employment contract may be regarded as a mutual agreement as both parties perform their acts in order to receive consideration. Such exchange of performances constitutes the content of the respective legal relationship and can, in principle, be expressed as “no work, no remuneration”. The Soviet era has rendered us a saying "no work, no food" which actually means that if no work is done, wages cannot be paid.

Such a synallagmatic approach leads to the conclusion of a contract as the employee assumes an obligation to receive remuneration and the employer employs the employee in order to achieve personal financial success. Reciprocity dictates the expiry and performance of the contract. Remuneration is determined according to the act performed. Consequently, the labour law relationship is aimed at the economic exchange of the employee’s work result for the remuneration given by the employer. Thus, an employment contract serves as a synallagmatic contract.*[27]

As in the case of other agreements, an employment contract requires the existence of an offer and acceptance. The employer offers a vacancy and if the employee accepts it, the contract has been concluded. Under the employment contract, the employee undertakes to work for a specified or unspecified period as a subordinate to the employer, whereas the employer, in his or her turn, undertakes to pay remuneration. On the basis of the employment contract, a bilateral relationship in the law of obligations is created, in which work and remuneration for work are exchanged for each other. Since the mutual obligations are of a lasting nature, the contract of employment is a lasting relationship in the law of obligations.*[28]

25 Daily cash transactions could serve as examples here.

26 H. Hammen (Note 16), p. 175.

27 H. Wiedemann. Das Arbeistverhältnis als Austausch- und Gemeinschaftsverhältnis. Karlsruhe: C. F. Müller, 1966, S. 9–10.

28 W. Zöllner, K.-G. Loritz. Arbeitsrecht: ein Studienbuch. 5. Aufl. München: Beck, 1998, S. 154–156.

3.1. Performance of work — individual or generic obligation?

Speaking about a labour law relationship as a relationship in the law of obligations, we should determine whether it concerns a generic or an individual obligation, *i.e.* whether the promised performance can be limited on the basis of individual or generic features. The type of the obligation — an individual or a generic obligation — depends on the transaction; in most cases, on the contract.*[29]

If a worker is employed, *e.g.* as a mason, joiner, *etc.*, his or her duty of employment can generally not be determined by individual features. The obligations arising from such formation of contract are generic obligations. Here we have to mention, however, that the object of the employment contract, *i.e.* or the work performed is not determined specifically but through general, that is generic features. The individual specification of the work that the worker is obliged to perform under the employment contract is not possible since it is not usually clear at the time of concluding the contract what performance — serving as best for achieving the object of the contract — will be required of the worker in six months or two years. Insofar as the circumstances of the performance have not been individually determined but only agreed on as "the framework" and the individualisation of the performance is carried out by the employer, the duty of employment serves as an obligation with generic features.*[30]

The classification of work performance as a generic or individual obligation is debatable. We may agree with the opinion that it is appropriate to distinguish between the individual and generic obligation primarily in the case of things and goods. We may speak of things with individual features and things with generic features. When it comes to work performance, such distinction is unnecessary. By concluding an employment contract, an employee assumes an obligation to perform work. With regard thereto, it is expected that, arising from the object of the contract, the employee assumes a duty to perform the best work. The employer's expectations are also aimed at the best work to be performed by the employee as a result of the object of the employment contract. When concluding an employment contract, the tasks of the employee — the work that the employee will be obliged to perform — are agreed upon. No alterations can be made to the duties of the employee without the employee's consent. The individual specific tasks to be carried out by the employee in the course of his or her employment can be specified both by the employer and the employee. The main goal is to perform the tasks in the best manner possible. Consequently, the determination of the performance of work as an individual or a generic obligation is neither necessary nor feasible.*[31]

3.2. Features of employment contract

An employment contract is characterised by four typical features.

Under the employment contract, an employee is obliged to work and render to the employer his or her working abilities and capacity. Unless otherwise determined by the agreement between the parties or actual circumstances, the employee must perform his or her task personally. The work must be work performed by a natural person and it must be an activity in the positive sense even when it is actually not an active activity.*[32] Establishment of on-call time could serve as an example here. During on-call time, an employee must be at the disposal of the employer and if necessary, perform the orders given by the employer. This is a case of exceptional regulation of working time as the employer pays additional remuneration to the employee for on-call time. In fact, on-call time means that the employee is not actively involved in performing his or her tasks but during on-call time, he or she is ready to commence work.

With regard to an employment contract, the type of work is not important. Work comprises both manufacturing operations and activities aimed at the satisfaction of a particular need. Work may be

[29] Objections have been made to the treatment of work performance as a generic obligation. So it has been claimed that a distinction between an individual and generic obligation can be made only in the case of goods, not in human work; an individual is not obliged to do any kind of work but only the best work required by the object of the contract, see H. Hammen (Note 16), p. 181.

[30] H. Hammen (Note 16), p. 182.

[31] Conditionally, we may say that performance of work is an individual obligation as particular tasks to be performed by the employee are agreed upon in the employment contract. The performance of any other tasks within the framework of that particular employment contract is, in principle, unfeasible.

[32] M. Rehbinder. Schweizerisches Arbeitsrecht. 13. Aufl. Bern: Stämpfli und Cie AG, 1997, S. 34. *E.g.* Availability for work presumes that the employee is not actively involved in some activity.

physical and intellectual. Thus, an employee is not responsible only for the actual outcome but, above all, for rendering his or her working abilities and capacity to the employer.

An important feature of an employment contract is the relation of the performance of work (contractual duty to perform) to a specific term or else it is performed without a specified term.*[33] In the framework of a lasting relationship in the law of obligations, the employee is obliged to engage in his or her contractual performance (work) repeatedly. The performance of the employment contract is not restricted to a single transaction aimed at reciprocal exchange (*e.g*. transfer deeds). It is characteristic of the employment contract that the work performed is related to a particular number of repetitive performances during a particular period. At the same time, it is not important whether the above-mentioned individual performances have been agreed upon earlier or not. Thus, the labour law relationship does not expire with its performance as it is in the case of, *e.g*. gratuitous contract or may also occur in other contracts concerning performance of work; the labour law relationship terminates with the expiry of the term or termination of the contract on the bases prescribed by law.

A distinction must be made between the duration of a particular contract and working time. Working time characterises the amount of work demanded of an employee over a particular period. In the case of an employment contract it is not important that the employee be fully at the employer's disposal during the labour law relationship. Also a contract under which an employee is obliged to work part-time may be regarded as an employment contract. In this respect, the law equalises working full-time with working part-time. However, it cannot be precluded that contracts are concluded for a specified term in order to disregard labour law provisions. To avoid such a situation, the legislator must clearly define the occasions when it is possible to conclude employment contracts for a specified term. In general, employment contracts are concluded for an unspecified term.

Working under an employment contract must be performed for remuneration. Payment of remuneration is a consideration and at the same time also the employer's main duty. An agreement concerning the remuneration is one of the essential conditions of an employment contract. Unless a specific amount of remuneration is agreed upon in an employment contract, the applicable Wages Act provides that the minimum remuneration must be guaranteed to an employee. The legislation of some countries prescribes such remuneration as is common for such work.*[34] We should consider the inclusion of such a principle in the Estonian legislation. The provision would definitely be more favourable than the current minimum wage since the ordinarily paid remuneration is higher, as a rule.

When describing the duty to pay remuneration, the temporal feature is irrelevant, *i.e*. an employment contract will continue to be an employment contract even when remuneration is not determined according to the amount of time worked but in some other manner, *i.e*. as piece rates or wages.*[35]

Having concluded an employment contract and commenced work at the position, the employee subdues himself or herself to the employer's orders; he or she subdues himself or herself to the employer's authority and is therefore both legally and economically dependent. Consequently, the subordination of an employee to the employer's authority and the employee's duty to obey may be referred to as the typical features of an employment contract.*[36] This feature is characteristic of a labour law relationship and it is used to distinguish between the employment contract and other contracts that are aimed at performing work. The employer has a right, arising from the employment contract, to determine where, when and how work must be performed; within the framework of the employment contract, the employer disposes of the employee's working abilities and capacity to meet his or her general needs and goals. Thus, the employment contract is characterised as a contract aimed at the application of working abilities and capacity determined by a stranger.*[37]

Under the employment contract, an employee subdues his or her working abilities and capacity to the employer and the employer pays to the employee remuneration for disposing of and using his or her working abilities and capacity. From the legal and social perspective, any contractual relationship includes complicated relations between two parties. The treatment of the employment contract as a civil law contract is justified both by the historical development of this contract and the nature of the employment contract. An employment contract as a civil law contract provides the parties with more opportunities to form their employment relationships. Under circumstances where the legal regula-

33 *Ibid*., p. 35.

34 *Ibid*., p. 68.

35 *Ibid*., pp. 36–37.

36 *Ibid*., p. 34.

37 *Ibid*.

tion of the employment contract is insufficient, the parties may apply the overall principles of civil law contracts.

Generally, it has been attempted to take the legal regulation of the employment contract to as concrete a level as possible in order to avoid recourse to the civil law provisions. The legal regulation of employment relationships need not prove sufficient even in the case of the optimum regulation and thus, in relation to the employment contract, there will always be an option to rely on the overall principles of civil law in borderline situations. When regarding the employment contract absolutely separately from the other civil law contracts, it would mean that, *e.g.*, the principles of representation, offer and acceptance, *etc.* need to be developed separately for labour law. The development of separate provisions becomes unnecessary when we apply the provisions provided for civil law contracts to employment contracts. In the case of employment contracts, the specific areas concerning employment contracts when compared to the other civil law contracts require to be regulated first of all. In other words, upon the legal regulation of employment contracts, those particularities must be expressed that are not governed by civil law or where it is necessary, proceeding from the specific characteristics of an employment contract and labour law relationship, to diverge from the principles of civil law contracts. Due to the social protection aspect of the employee, it must be specified with regard to employment contracts how the employee is employed, what the employer's right to be informed about the employee's past is, what the employee's and employer's specific obligations in the employment relationship are, how the employer can exercise his or her authority, what the limits to the employer's authority are. In the case of employment contracts, their termination is socially the most sensitive area and additional regulation is definitely required here.

Historically and with regard to its content, the employment contract is a subcategory of civil law contracts, whereas the situation does not differ nowadays either. Although a separate code of rules, focusing on all the aspects related to the employment contracts, has evolved therefor, it does not mean separation from the regulation of civil law contracts. In the case of employment contracts, the following principle prevails: if an adequate solution cannot be found in the particular regulation of labour law, the overall principles of civil law contracts will be applied.

4. Labour law is contract law?

An employment contract is a bilateral contract. Thus, an employment contract may be regarded as a relationship in the law of obligations, aimed at the exchange of work and wages. Through the employee's right of defence, the obligations in public law are imposed on the employer in order to implement the legal provisions intended to protect the employee. The provisions prescribed by law to protect the employee are mandatory by nature. The employee's right of defence is exerted by means of the state supervision, by duress and punishment or fines and irrespective of the employee's will. Due to this function, it belongs to the sphere of public law. Nevertheless, all aspects of the labour law relationship related to the employment contract cannot be regarded as contract law. The labour law relationship comprises very many circumstances that, although related to the employment contract, are regulated outside contract law. Here the legal regulation of holidays as well as working and rest time could serve as examples. Within the framework of contract law, it is only generally possible to determine that the employer is obliged to grant a holiday to the employee during a particular period. Also, in the framework of contract law, it can be generally determined that the employee's working time may not exceed a particular standard for working time and the employer must pay to the employee additional remuneration for additional work. However, it is the provisions outside contract law that regulate more precisely how working and rest time are organised, holidays are granted and what classes of holidays exist. These are provisions in public law the non-compliance with which entails sanctions in public law.

Although the principles applicable to civil law can be, to a certain extent, applied to the employment contract, and labour law is actually a part of the private law system, labour law can still not be considered as contract law. Even if the parties could freely agree upon all the working conditions, particular minimum provisions would evolve under collective agreements to which the parties must adhere. The establishment of absolute freedom of contract in labour relations is not currently feasible. However, one must also examine the development of civil law as a whole. In civil law, we can no longer speak of an extensive freedom of contract today, since numerous restrictions (*e.g.* standard conditions, consumer protection, protection of the lessee upon the termination of a residential lease relation) have been added to the conclusion, formation and termination of the contract in civil law regulation. Consequently, the employment contract law and contract law are not as fundamentally different as they are considered to be. However, labour law will remain an independent branch of law primarily due to the possibility of collective regulation of employment relationships. This is a specific feature of labour law that is not evident in contract law.

Conclusions

The fear of the application of civil law principles to labour relations is primarily related to uncertainty about the consequences that the application of these principles may entail. It is understandable as it is impossible to plan extensive liberalisation of employment relations without a thorough analysis. However, this attitude is, to a large extent, caused by the fact that civil law is understood as total freedom of contract and opportunities for the parties to do anything in such a system. Nevertheless, in civil law as a whole, private autonomy has been subjected to various restrictions and thus it is not possible to speak of absolute freedom of contract in civil law. In an employment relationship, the freedom of contract remains even more limited than in other contractual relationships. As long as there is a dependent salaried workforce, the special status of labour law in the private law system will continue to exist.